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No. 79-1540

IN THE

Supreme Court of the United States

October Term, 1979

EDWARD SADLOWSKI, *et al.*,
Petitioners,

v.

RAY MARSHALL, SECRETARY OF LABOR
and
UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT UNITED STEELWORKERS OF AMERICA IN OPPOSITION

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Respondent United Steelworkers of America, AFL-CIO-CLC (hereinafter "USWA"), opposes the petition of Edward Sadlowski, et al., for a writ of certiorari.

This case involves nothing more than application of a clear rule of law, established by this Court in *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), to simple and undisputed facts. The complaint in this case sought to have the district court overturn a decision of the Secretary of Labor not to sue to upset the results of a union election. In *Bachowski*, this Court ruled that where such relief is sought the congressional purposes underlying Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (hereinafter "LMRDA") require that the scope of judicial review be strictly limited (421 U.S. at 572-573):

> Except in what must be the rare case, the court's review should be confined to examination of the "reasons" statement, and the determination whether the statement, without more, evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious.

In the district court, USWA (intervenor-defendant) and the Secretary of Labor (defendant), relying upon *Bachowski*, moved for summary judgment based upon the Statement of Reasons the Secretary had issued in conjunction with his decision not to sue to challenge the results of USWA's election. Plaintiffs, petitioners here, offered *no* evidence of any kind, but simply contended that the Statement of Reasons was not a sufficient basis for summary judgment. Applying *Bachowski*, the district court ruled "that its judicial review is limited to the statement of reasons provided by the Secretary in support of his decision not to bring suit." Pet. App. 16a.[1] And, the court concluded: "A review of this eighty-three page document and the entire record in this case satisfies the court that the Secretary's decision was not arbitrary and capricious and was within the bounds of his statutory discretion." Pet. App. 16a-17a.

Accordingly, the district court granted the motions for summary judgment filed by USWA and the Secretary. The court of appeals summarily affirmed that decision. Pet. App. 1a. Rehearing was denied, and in response to plaintiff's suggestion of rehearing *en banc* in the court of appeals "no judge in regular active service requested a vote thereon." Pet. App. 3a.

Nothing about this case warrants this Court's plenary consideration.

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[1] Citations to the appendix attached to the petition for a writ of certiorari are in the form "Pet. App."

Counter-Statement of Facts

Plaintiffs seek to obscure the issue here by raising a thick smoke-screen of extra-record allegations and innuendo. Thus, they have filled their petition with an unrelenting attack on the character of USWA—as well as, to a lesser extent, on the character of officials and employees of the Department of Labor and an Industrial Commissioner appointed by the Canadian Minister of Labor. That attack is not predicated upon any evidence that plaintiffs or any other party deemed fit to put before the district court as a basis for its decision; rather, plaintiffs recite allegations and innuendo from their own complaint—and a few assertions put forth for the first time on appeal—which they did not attempt to establish by declaration, affidavit or in any other fashion in opposing the motions for summary judgment, the granting of which they now challenge.[2]

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[2] Rule 56(e), Federal Rules of Civil Procedure, provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

By submitting literally nothing to support their accusations, plaintiffs thus failed totally to establish that there were any genuine issues of fact. While plaintiffs' extra-record allegations and innuendo are irrelevant to disposition of this petition, we ask the Court's indulgence that we may note the following:

First, USWA and the Secretary filed answers responding in detail to such of plaintiffs' accusations as appeared in plaintiffs' complaint. And, of course, to the extent plaintiffs' allegations of misconduct by USWA were presented to the Secretary, the results of the Secretary's investigation are contained in the Statement of Reasons.

Second, if the true "background" (Pet. at 4) of this case were relevant here, it is not that offered by plaintiffs but rather that

Remarkably, plaintiffs never address in their petition the evidence that is in the record and upon which the courts

reflected by the following: USWA is one of the few international unions which chooses its top officers by referendum election—most other unions opting for the selection of officers at delegate conventions; USWA has a long history of successful insurgent campaigns, with incumbents being defeated in elections for every level of office from International president on down; indeed, ten of the members of the present 29-member International Executive Board gained their position by defeating incumbents or administration-backed candidates. Moreover, as discussed in the Secretary's Statement of Reasons, with respect to the very election which plaintiffs now challenge—an election which plaintiffs depict as a sham perpetrated by a mythical "Official Family . . . a private government outside the law of the land" (Pet. at 4)—USWA requested "full and complete supervision of the . . . election by the Department [of Labor]," and, while the request was refused, USWA was able to obtain a significant degree of Government oversight and assistance in the conduct and monitoring of the election. Joint Appendix in the court of appeals (hereinafter "JA") at 147-149.

Third, plaintiffs give prominence to their allegation that the Solicitor of Labor and counsel for USWA engaged in improper conduct in another case at a time subsequent to the Secretary's determination and Statement of Reasons here. Pet. at 7-8, 12 n. 8. Plaintiffs chose not even to *make* this allegation in the district court in this case, let alone to introduce evidence supporting it, notwithstanding that at the very same time they *were* making the allegation in the case in which they allege the purported misconduct occurred, *Marshall* v. *United Steelworkers of America*, Civil Action No. 73-957 (W.D. Pa.). (It was in that latter case, not in this case, that "Solicitor Clauss and attorney Gottesman . . . successfully resisted being deposed" (Pet. at 8)—the magistrate in that case finding such discovery to be irrelevant to all issues then pending). There is thus not a shred of evidence in this case to support the charge of misconduct which they allege, or at least insinuate. While we resist the urge to be dragged into discussion of the merits of allegations that are extra-record and extraneous in any event, we wish to state categorically with respect to the incident in question that no impropriety occurred.

below reached their decision: the Secretary's explanation, as set forth in the Statement of Reasons, for the decision not to bring suit to upset USWA's 1977 election of its International Officers. Plaintiffs prefer to speak of the alleged "background" of the case than to discuss the case itself, see Pet. at 4-8; and plaintiffs prefer to mention the allegations of misconduct that they submitted to the Secretary than to set forth the findings of fact the Secretary made as to these allegations, see Pet. at 8-10. The contents of the Secretary's Statement comprise the sum and substance of what this case is about. The sole issue in the case is whether the district court was correct in ruling that that Statement is a sufficient basis for summary judgment. Accordingly, we briefly summarize herein the Statement's contents.

A USWA election for international officers is a massive undertaking, as the Statement describes (JA 147):

> The conduct of an international election in the United Steelworkers of America is a formidable task. The union is the second largest in the United States and has approximately 1,400,000 members. It is divided into 25 Districts, 22 in the United States and three in Canada, each headed by a District Director who is an International officer. Within the Districts, there are subdistricts and approximately 5,125 local unions with 827 of these being in Canada. The actual election is conducted by these local unions, acting as agents for the International.

Under the LMRDA, the Secretary is required to determine whether to file suit and, if appropriate, to file suit within 60 days after receiving an election challenge from a complaining union member, 29 U.S.C. § 482(b), subject only to such extensions of that period as the union being investigated may grant.[3] The task of the Secretary in the instant

[3] See, *e.g.*, *Hodgson* v. *International Printing Press & Assist. Union*, 440 F.2d 1113, 1117 (6th Cir. 1971) *cert. denied*, 404 U.S. 828 (1971); *Hodgson* v. *Local 851, Int. Ass'n of Mach. & Aerospace Workers*, 454 F.2d 545 (7th Cir. 1971).

case was to devise an investigative program which was equal to the enormity of the inquiry yet capable of being performed within the statutory time limits. The Statement describes in detail the investigation that the Department of Labor conducted with respect to the United States portion of the election, which included *inter alia* utilizing 250 investigators, who worked 60 hours per week and interviwed 5422 witnesses (JA 152-153, 154):

> Even before the receipt of Sadlowski's complaint, the Department made plans for the investigation of any complaint to the Secretary which might be filed. Arrangements were made to have two hundred and fifty compliance officers (investigators) available to work on the case, including many who were specially detailed to this project from their normal assignments in other program areas. These were given special training for the assignment. The compliance officers were divided into teams of two, with supervisors located at headquarters established in the 22 cities where the Steelworkers had District offices. Kits were prepared for each investigator, containing among other things the internal protests, a sample ballot, the International Union's Constitution and Elections Manual, and special instructions. The supervisors attended a day-long meeting devoted to discussing the plan for investigating a complaint directed to the Steelworkers election, in the Department's Washington office during the first week in June. When Sadlowski's complaint was filed on Friday, June 17, 1977 all compliance officers working on the case immediately proceeded to their assigned locations and investigation was started. Each compliance officer was expected to work six days a week, ten hours a day. A special post office box was leased and all reports were mailed directly to the Washington office which was open seven days a week.
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> The 301 United States locals named in the protest and the complaint to the Secretary were investigated. In addition an investigation was conducted of the 153 local unions which filed no election returns and an additional 225 local unions were selected for investigation. The selection of local unions for investigation was primarily based on factors which indicated some reason for suspicion, *e.g.*, lopsided results, or information gathered in the technical assistance process. As a result of leads received during the course of the investigation, 33 more locals unions were investigated, including all of the local unions in Puerto Rico because in its early stages the investigation indicated a high incidence of violations there. Interviews were conducted with 21 District Directors, 541 staff representatives, 159 clerical employees, 250 "casual" employees, 1,613 local union officers, 257 candidate observers, and 2,581 rank-and-file members. The 712 locals which were finally investigated represented 351,000 members or approximately 25 percent of the membership of the International Union, and accounted for approximately 30% of the votes cast in the United States.

The Statement emphasized that the investigation was not based on a random sample of USWA locals, but rather was designed to reach every local where there was any reason to suspect a violation (JA 233, emphasis added):

> The investigation did not extend to every local union, but was planned so as to focus on those areas in which there was *any indicated possibility of violations being disclosed.* The investigation extended to every District and Subdistrict Office, and included a thorough review of records and interviews of personnel at the national level. At the local level, the investigation began with the locals enumerated in the complaint and all locals in which the election results appeared in any way questionable. It was expanded to include all locals for which leads were developed. . . .

Based on the results of this investigation, the Secretary reached the following conclusion as to the overall conduct of the election in the United States (JA 154):

> The investigation in the United States did not disclose widespread fraud or other irregularities as alleged, nor were the findings such as to indicate a pattern of violations which could be extrapolated beyond the area of investigation. On the whole, the election was con-

ducted in accordance with the law and with the Union's Constitution.

That is not to say of course that the Secretary's investigation disclosed no violations at all. In the words of the Statement, "there were as there are in any large election numerous violations of law, disclosed by the investigation." JA 155. The Secretary's approach to these scattered violations[4] was: (1) to calculate the "potential effect" of each; (2) to aggregate the "potential effects" of all violations; and (3) to determine whether the aggregate of the "potential effects" of all violations was of sufficient size to offset the actual margins of victory in the election. The Statement explains, "[t]his calculation was required in order to make the statutory determination whether the violations in their totality 'may have affected the outcome' of the election." JA 155.

The Statement spends approximately 75 of its pages detailing, on a local-by-local, allegation-by-allegation basis, the evidence found with respect to each category of violation alleged by plaintiffs. JA 155-230. In each instance where the Secretary found a violation, the Statement sets forth the number of votes attributed to that violation as its "potential effect."

The Statement sets forth the principles by which the Secretary calculated the "potential effect" of each violation (JA 155):

> 1. When members' valid votes had not been tallied, they were credited as cast. When members were denied the right to vote, their votes were credited to Sadlowski on the assumption that, if given the opportunity, they may have voted for him.
>
> 2. When a violation cast doubt upon the validity of a local election as a whole (*e.g.*, inadequate safeguards or lack of secrecy), all votes cast were regarded as void.
>
> 3. When a violation tended to influence voters in favor of one candidate (*e.g.*, expenditure of union funds or campaigning in the polling place), all votes cast for that candidate which were subject to the improper influence were deducted from his total. When there was a combination of violations in the second category and this category, votes cast for the "non-offending" candidate were not voided.
>
> 4. When ineligible members voted, or when eligible members voted more than once, their votes were deducted from McBride's total.
>
> 5. When the violations were such that all votes cast were considered void (*e.g.*, inadequate safeguards or lack of secrecy) and in addition the local failed to file an election return the violations were deemed to have offsetting effects and no changes were made in the vote totals.

[4] For the purposes of discussion, we use the term "violation" to characterize each instance where the Secretary found "probable cause" to believe that a violation had occurred. We do not mean thereby to concede that the Secretary could have proved each such violation.

Each of the plaintiffs had been defeated by a wide margin in the election. Out of a total of approximately 560,000 votes cast in the United States and Canada, the closest race (International Vice President (Human Affairs)) was decided by 52,000 votes and the margins in the other races were higher, reaching 120,000 votes in the race for International Secretary. In the race for International President, Lloyd McBride defeated plaintiff Edward Sadlowski by a vote of 328,861 to 249,281, a margin of nearly 80,000 votes. JA 150.

The Secretary found that the aggregate of the "potential effects" of the violations found in the United States would not offset plaintiffs' margins of defeat in the United States portion of the election. Thus, the Secretary found (JA 233, emphasis added):

> McBride's margin of victory *in the United States* was

42,448. Adding the votes which have been credited to him or deducted from Sadlowski, the margin would be increased by 2,093, to 44,541. Deducting the votes which have been taken from McBride's total or credited to Sadlowski would reduce the adjusted margin by 17,263 votes, to 27,278 votes.

The Secretary concluded that (*ibid*):

> "These figures demonstrate to the satisfaction of the Department that the violations which occurred could not have affected the outcome of the election within the United States."

After reiterating that the investigation was designed to focus "on those areas in which there was any indicated possibility of violations being disclosed," the Secretary emphasized that (JA 231):

> . . . [E]ven if there were any violations in locals which were not investigated, the investigation was so thorough and was directed in such a manner that there is no reasonable cause to believe that any such violations were significant in magnitude or in effect.

The Secretary faced a special problem with respect to investigating violations alleged to have occurred in the Canadian portion of the election: LMRDA does not apply in Canada, and the Secretary is without power to conduct an investigation in that country. The Statement sets forth the Secretary's resolution of that problem (JA 154):

> The allegations in the complaint relate to the election which was conducted in the United States and it was also alleged that violations of law occurred in the Canadian local unions and districts. The Secretary of Labor has, of course, no authority to send investigators into Canada and all investigations conducted by the Department of Labor took place in the United States. In an earlier case involving another union, the Canadian Government refused the Department's request to pursue its investigation within Canada. Because of this, the Department attempted in this matter to proceed to make arrangements for an investigation in the local unions and Districts located in Canada. Arrangements were made for the appointment by the Canadian Labor Minister of an Industrial Inquiry Commissioner, Mr. Roland Tremblay, to probe the conduct of the Canadian portion of the election. Mr. Sadlowski's attorney was advised of that fact. On October 25, 1977, an Industrial Inquiry Commission Report was issued by Commissioner Tremblay and copies were sent to the Department of Labor, the International Union and the complainant.

Mr. Tremblay, the Commissioner appointed by the Canadian Ministry of Labor to lead the inquiry, is "a former provincial judge and president of the Arbitrators Conference in Quebec and of the Economic Arbitrators of Canada." JA 300.[5] The Industrial Inquiry Commission reported that its investigation did not establish "that there was any fraud, corruption, malfeasance, or even evil intent in the conduct of the constitutional election of the United Steelworkers of America, which took place in Canada on 8 February 1977." JA 294.

The Secretary concluded that Commissioner Tremblay's report "provides no basis for assuming that violations occurred of sufficient magnitude that they may have affected the outcome of the *Canadian portion of the election,*" much less that they were of sufficient magnitude to negate not only the entire Canadian margin for the McBride slate but also to cancel the substantial margins for that slate in the United States which remained even after the Secretary's deductions for tainted results (JA 231, emphasis added):

> McBride's margin in Canada was some 37,000 votes. Commissioner Tremblay's report indicates evidence in some local unions of matters that appear to be violative of the Act, but it provides no basis for assuming that violations occurred of sufficient magnitude

[5] The repeated assertion in the petition that Mr. Tremblay was "in the pay of the Steelworkers" (Pet. at 11, 12, n.9, 13, 16) is without any foundation in the record and is in any event ridiculous, as explained at note 11, *infra*.

that they may have affected the outcome of the Canadian portion of the election. The violations in Canada, when combined with violations in the United States, could have affected the outcome of the election only if they may have affected a number of votes exceeding McBride's entire Canadian margin of victory, *plus* sufficient additional votes to overcome his untainted margin of 27,000 votes in the United States.

"Thus," the Secretary concluded, "the outcome of the entire election could not have been affected by the combined violations in the United States and Canada." JA 231.

Reasons For Not Granting The Writ

This case was decided correctly by the courts below and in any event involves no issue worthy of this Court's attention. The district court, affirmed by the court of appeals, decided that this case involves nothing but the application of the *Bachowski* standard of review to the Statement of Reasons issued by the Secretary, and that the Statement easily meets that standard—*i.e.*, the Statement does not show the Secretary's decision to be arbitrary and capricious. Plaintiffs attempt in their petition to make the case appear to involve more. But their rhetoric reduces to two simple legal contentions: they contend both that they were entitled to a broader standard of review than that afforded under *Bachowski*, and that even under the *Bachowski* standard the Statement does not pass muster. We show below that neither of these contentions bears analysis.

1. *Standard of judicial review.* Plaintiffs argued in the court below, and imply in their petition here, that their suit to set aside USWA's 1977 election of officers should not be governed by the *Bachowski* standard—*i.e.*, that they are entitled to broader judicial review than a

> . . . review . . . confined to examination of the "reasons" statement, and the determination whether the statement, without more, evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious.

421 U.S. at 572-573. Plaintiffs base this entitlement upon their contention that, while they seek the same *relief* as in *Bachowski*—to set aside the Secretary's decision not to sue to challenge the results of a union election—the alleged *grounds* upon which they seek that relief are different: plaintiffs challenge not only the substance of the Secretary's decision, as in *Bachowski*, but also the adequacy of the investigation leading to that decision and the Secretary's purported failure to perform as their lawyer during the investigation and decision-making process. See Pet. at 11-16. These different grounds, according to plaintiffs, remove their case from the restrictions of *Bachowski*, and accordingly entitle them to a full trial in district court, not merely to review on the face of the Statement of Reasons.[6]

Plaintiffs' argument flies directly in the face of *Bachowski*, and of this Court's understanding of the congressional intent in adopting the enforcement scheme of Title IV of LMRDA. The issues resolved in *Bachowski* were whether and to what extent there may be judicial review of a decision by the Secretary of Labor not to sue to set aside a union election. The standard of judicial review set forth in *Bachowski* was the culmination of Court's resolution of those questions, and was presumably to be applicable to any suit challenging such a decision by the Secretary. The case here is precisely such a suit: it challenges the Secretary's decision not to sue to set aside the results of USWA's 1977 election of officers and seeks to have that decision judicially reversed. JA 62. Nothing in *Bachowski* indicates that the standard of judicial review in a suit of this type should somehow be different depending on the particular grounds upon which the Secretary's decision is alleged to be inadequate,[7] and the rationale of *Bachowski* refutes any such contention.

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[6] See note 9, *infra*.

[7] See note 9, *infra*.

Title IV of LMRDA invests in the Secretary the exclusive power to sue to set aside a union election. 29 U.S.C. § 483. The Act does not expressly provide for any judicial review of a decision by the Secretary not to sue. In *Bachowski*, the Court, finding no " 'clear and convincing evidence' that Congress meant to prohibit all judicial review of the Secretary's decision," ruled that the Administrative Procedure Act authorizes a limited scope of review, 421 U.S. at 568. The Court was careful to state, however, that (421 U.S. at 568):

> although no purpose to prohibit all judicial review is shown, a congressional purpose narrowly to limit the scope of judicial review of the Secretary's decision can, and should, be inferred in order to carry out congressional objectives in enacting the LMRDA.[8]

The Court derived the precise contours of that limited scope of judicial review from its understanding of those "congressional objectives." Thus, the Court reviewed the reasons that persuaded Congress to make the Secretary's power to bring suit exclusive, precluding defeated candidates from bringing their own suits to challenge union elections (421 U.S. at 568-570):

> Congress "decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest . . . [and] decided not to permit individuals to block or delay union elections by filing federal-court suits. . . ." *Calhoun* v. *Harvey*, 379 U.S. 134, 140 (1964). Congress' concern was "to settle as quickly as practicable the cloud on the incumbents' titles to office,". . . . ". . . Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted. . . ." *Trbovich* v. *Mine Workers*, 404 U.S. 528, 532 (1972). ". . . Congress intended to prevent members from pressing claims not thought meritorious by the Secretary, and from litigating in forums or at times different from those chosen by the Secretary."

Given these congressional objectives, the Court concluded that judicial review must be restricted in the following two respects (421 U.S. at 571, 573):

> [1] . . . [S]ince the statute relies upon the special knowledge and discretion of the Secretary for the determination of both the probable violation and the probable effect, clearly the reviewing court is not authorized to substitute its judgment for the decision of the Secretary not to bring suit. . . .
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> [2] The full trappings of adversary trial-type hearings would be defiant of congressional objectives not to permit individuals to block or delay resolution of post-election disputes, but rather "to settle as quickly as practicable the cloud on the incumbents' titles to office"; and "to protect unions from frivolous litigation and unnecessary interference with their elections."

In this light, the Court fashioned the appropriate scope of judicial review (421 U.S. 572-573):

> Except in what must be the rare case,[9] the court's

[8] As the Chief Justice observed in his concurring opinion, 421 U.S. at 590:

> . . . [T]he Court has fashioned an exceedingly narrow scope of review of the Secretary's determination not to bring an action on behalf of a complainant to set aside an election. The language and purposes of § 401 of the [LMRDA], 29 U.S.C. § 481, have required the Court to define a scope of review much narrower than applies under [the APA] in most other administrative areas.

[9] In footnote 12 of their petition, plaintiffs suggest that they may qualify for the "rare case" exception to the rule that judicial review should be limited to the face of the Secretary's statement of reasons. This Court described the nature of that exception (421 U.S. 574):

> The Secretary himself suggests that the rare case that might justify review beyond the confines of the reasons statement might arise, for example, 'if the Secretary were to declare that he no longer would enforce Title IV, or otherwise completely abrogated his enforcement responsibilities . . . [or] if

review should be confined to examination of the "reasons" statement, and the determination whether the statement, without more, evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious. Thus, review may not extend to cognizance or trial of a complaining member's challenges to the factual bases for the Secretary's conclusion either that no violations occurred or that they did not affect the outcome of the election.

The *Bachowski* standard thus contemplated that resolution of challenges to decisions by the Secretary not to sue would be by summary judgment, not trial (421 U.S. 573, 574):

> If . . . the Court concludes . . . there is a rational and defensible basis [stated in the reasons statement] for [the Secretary's] determination, then that should be an end of this matter, for it is not the function of the Court to determine whether or not the case should be brought or what its outcome would be.
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> When the district court determines that the Secretary's statement of reasons adequately demonstrates that his decision not to sue is not contrary to law, the complaining union member's suit fails and should be dismissed.

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the Secretary prosecuted complaints in a constitutionally discriminatory manner. . . .' Brief for Petitioner 9 n. 3. Other cases might be imagined where the Secretary's decision would be 'plainly beyond the bounds of the Act [or] clearly defiant of the Act.' *DeVito II*, 72 L.R.R.M. at 2682. Since it inevitably would be a matter of grave public concern were a case to arise where the complaining member's proofs sufficed to require judicial inquiry into allegations of that kind, we may hope that such cases would be rare indeed.

Even if, *arguendo*, plaintiffs' allegations were the "kind" which the Court contemplated "inevitably would be a matter of grave public concern," those allegations alone, unsupported by affidavits, declarations or other proper proof, are not enough to defeat the motions for summary judgment made below. See Rule 56(e), Federal Rules of Civil Procedure, quoted in pertinent part at note 2, *supra*. *Bachowski* itself, as just quoted, contemplates that the "rare case" of judicial inquiry beyond the confines of the reasons statement could be occasioned only by sufficient "proofs." 421 U.S. at 574. Plaintiffs, however, have come forward only with allegations and rhetoric.

Thus, plaintiffs pick out a distinction without a difference when they point to the fact that their grounds for relief from the Secretary's decision are not the same as the grounds asserted in *Bachowski*. Plaintiffs may assert different grounds, but the relief they seek is the same: to have the Secretary's decision not to sue set aside. For example, their quest for "a full, reasonable, and proper investigation of the February 8, 1977 election" (JA 62) implicitly seeks a setting aside of the Secretary's existing decision not to sue; otherwise, it is difficult to understand what purpose such an investigation would serve. The same is true of plaintiffs' request that the Secretary be directed "to fulfill his duty to act as lawyer for members of the Sadlowski slate." JA 62. A claim which would set aside the Secretary's decision not to sue is by any other name a claim governed by the *Bachowski* standard of review. The reasons which led this Court to adopt that standard are necessarily applicable to any such claims. For example, the conduct of an election investigation was as surely committed by Congress to "the special knowledge and discretion of the Secretary" as the rest of the decision-making process; with respect to the Secretary's decisions regarding the investigation as with the rest of the process there is thus "[t]he necessity that the reviewing court refrain from substitution of its judgment for that of the Secretary." 421 U.S. at 572. And, "[t]he full trappings of adversary trial-type hearings" as to plaintiffs' investigation and lawyer claims would be just as

> defiant of congressional objectives not to permit individuals to block or delay resolution of post-election disputes, but rather "to settle as quickly as practicable the cloud on the incumbents' titles to office"; and "to protect unions from frivolous litigation and unneces-

sary interference with their elections." (421 U.S. at 573)

The congressional concerns which prompted the *Bachowski* standard would go unsatisfied if defeated candidates could evade the restrictions of that standard simply by changing the grounds on which they would have the Secretary's decision set aside.

What we have so far established does not mean that the Secretary's conduct of the investigation is immune from judicial review. Nor does it necessarily mean that plaintiffs could not have secured a trial-type hearing had they sought to mandamus the Secretary at the time his allegedly defective investigation was in progress.[10] What it means, rather, is that in the context in which plaintiffs have presented their investigation claim—a *post-facto* effort to set aside the Secretary's decision—that claim is subject to review according to the *Bachowski* standard. The investigation the Secretary conducted is part of the basis for his ultimate decision not to sue. As with the other elements of that decision-making process, the investigation may be the ground for setting aside that decision only if, as revealed by the reasons statement, it was conducted in such a manner as to render the Secretary's decision arbitrary and capricious. Plaintiffs make several contentions regarding the investigation which are addressed to this standard; we respond to those contentions in part 2, *infra* at 19-24.

Similarly, plaintiffs' claim that the Secretary violated his "duty to act as the union members' lawyer" (Pet. at 14-16)—were there such a duty—would have to be resolved in this *post facto* suit to set aside the Secretary's decision in the manner prescribed by *Bachowski*: that is, as revealed by the Statement, did the Secretary perform his duty to

[10] We do not mean to imply that plaintiffs would have been entitled to such a hearing in a mandamus action, but only that the resolution of the issue here does not address the issue of the scope of review in a mandamus action.

function as lawyer for plaintiffs in such a manner as to render his decision arbitrary and capricious?

Even as a *Bachowski* claim, this claim would fail at the threshold. For, as the district court found, the duty to act as lawyer on which plaintiffs rely is "nonexistent." Pet. App. 16a. The Secretary's decision not to sue cannot be rendered arbitrary and capricious for failure to perform a non-existent duty.

Plaintiffs seize upon language in the legislative history of LMRDA, which is referred to in two Supreme Court cases, *Bachowski*, 421 U.S. at 570, and *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 539 (1972), and seek to create from it a legal duty applicable in a context where such a duty would make no sense.

Upon receipt of a complaint from a union member, the Secretary's duty is to investigate that complaint to determine whether probable cause exists for instituting a suit against the union, and, if so, to exercise his "discretion to select cases" based on "his subjective judgment as to the probable outcome of the litigation." *Bachowski*, 421 U.S. at 572. Congress,

> in deliberately [giving] exclusive enforcement authority to the Secretary . . . emphatically asserted a vital public interest in assuring full and democratic elections that *transcends the narrower interest of the complaining union member*. . . .

421 U.S. at 569 (emphasis added). Indeed, as part of that broader interest, Congress intended the Secretary to perform his function in such a manner as "to protect unions from frivolous litigation and unnecessary judicial interference with their elections." *Id.* The Secretary was thus not meant to be partisan or single-minded at the pre-lawsuit stages of his function; he was meant to serve a variety of interests, including some adverse to the interests of the complaining union member. In this light, it would be incongruous to find that at these stages the Secretary has a

legal duty to serve as lawyer for a party with a particular interest in the outcome of the decision the Secretary is to make.

The district court put it correctly (Pet. App. 16a):

> In conducting an investigation and in deciding whether probable cause exists to institute suit, the Secretary is to serve the public interest and not the interests of any private party. Only after the Secretary has instituted suit does he assume a partisan role and become an advocate for the complaining union member. See *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 539 (1972). This stage was never reached in this case. As a result, plaintiffs cannot seek judicial relief based on the Secretary's alleged violation of a nonexistent duty.

2. *Application of the standard of review to the Secretary's Statement.* In their petition, plaintiffs identify eight "examples" which they say reveal that the "Secretary's Statement of Reasons . . . was arbitrary and capricious *on its face.*" Pet. at 16 (emphasis in original). We address each "example" briefly in turn, using plaintiffs' numbering system for convenience in cross-referencing:

(i) Plaintiffs' first "example" is what they term the Secretary's "deliberate ambiguity" as to whether he "*is* or *is not* relying upon the so-called Canadian investigation." Pet. at 16 (emphasis in original).[11] Plaintiffs simply ignore the Statement's explanation of the account the

[11] Plaintiffs repeatedly assert without any foundation, that the Canadian investigation "was conducted by one Tremblay, *a man in the pay of the Steelworkers*" (Pet. at 11, emphasis in original; see also Pet. at 12, n. 9, 13, 16). Mr. Roland Tremblay was appointed to head the Canadian investigation by the Canadian Minister of Labor, pursuant to an Act of the Canadian Parliament. Mr. Tremblay is a former provincial judge, and at the time of his investigation herein was President of the Arbitrators Conference in Quebec and President of the Economic Arbitrators of Canada. JA 300. Plaintiffs submitted no evidence to substantiate their allegation that Mr. Tremblay was "in the pay of the Steelworkers." He has served as an impartial arbitrator of disputes between USWA and certain employers, and so far as we can tell it is this role which plaintiffs depict with their innuendo-laden characterization.

Secretary took of the results of the Canadian investigation (JA 231):

> McBride's margin in Canada was some 37,000 votes. Commissioner Tremblay's report indicates evidence in some local unions of matters that appear to be violative of the Act, but it provides no basis for assuming that violations occurred of sufficient magnitude that they may have affected the outcome of the Canadian portion of the election. The violations in Canada, when combined with violations in the United States, could have affected the outcome of the election only if they may have affected a number of votes exceeding McBride's entire Canadian margin of victory, plus sufficient additional votes to overcome his untainted margin of 27,000 votes in the United States. Thus, the outcome of the entire election could not have been affected by the combined violations in the United States and Canada.

The explanation is both unambiguous and wholly reasonable. Without authority to investigate in Canada—where the LMRDA does not even apply—the Secretary induced the Canadian Government to conduct an investigation pursuant to the Canadian labor laws, and to have the results of that investigation reported to the Secretary. Once having received that report, the Secretary obviously was faced with the question of how to assess the results of the Canadian investigation in light of the Secretary's findings in the United States portion of the election. As explained in the above-quoted passage from the Statement, that question was easily answered in this instance by the following logic.

> —The results of the Department of Labor investigation *in the United States* showed that even after deducting the maximum number of votes theoretically affected by all violations for which the Secretary found probable cause, each of the members of the McBridge slate still would have carried the United States by a substantial margin.

—In the official tally, each of the members of the McBride slate carried Canada by a wide margin, a fact the Canadian report attributed in substantial part to two facts: (a) that a Canadian was running on the McBride slate for one of the top offices, and no Canadian was running on the Sadlowski slate for a top office; and (b) that the McBride slate actively campaigned in French Quebec (and included a French Canadian candidate for National Director of Canada), whereas the Sadlowski slate did not engage in active campaigning in French Quebec (and had no French Canadian candidate for any office).[12]

—In order, therefore, for the findings of the Canadian investigation to be of significance with respect to the validity of the overall outcome of the election, they would have had to have disclosed violations which not only (a) negated the entire Canadian margin for the McBride slate candidates, but also (b) cancelled the substantial margin in the United States for these candidates which still remained after the Secretary's deductions of potentially "tainted" votes.

—As the Secretary's Statement recites, the Canadian report provides "no basis for assuming that violations [of LMRDA] occurred of sufficient magnitude that they may have affected the outcome of the Canadian portion of the election," much less the Canadian portion *plus* the remaining margins (after deductions) in the United States.

The Secretary's conclusion from all this is eminently reasonable: "Thus, the outcome of the entire election could not have been affected by the combined violations in the United States and Canada."

(ii) Plaintiffs' second asserted "example" of the irrationality of the Statement of Reasons on its face reduces to the following: if instead of focusing on the McBride versus Sadlowski election, examination is made of the Lynch versus Montgomery contest—the closest of the elections for USWA international officers, with Lynch beating Montgomery by over 52,000 votes[13]—then, in plaintiffs' words,

> [E]ven the Department's inadequate investigation eliminated *over* 90% of the margin [in the United States], [and] any additional investigation or the acceptance of plaintiffs' position on any of a score of contentions on the effect of violations would have required an opposite conclusion."

Pet. at 17. (Emphasis in original.)

As discussed more fully in response to (iii) below, the Secretary conducted an investigation of every local in the United States where there was any basis for suspecting a violation had occurred. For every violation turned up by that investigation, the Secretary then compiled the number of votes that might theoretically have been affected by that violation. The assumptions on which that computation was made are set forth *supra* at 8-9. These assumptions are, obviously, unrealistically generous to the challenging candidates. The following examples from the body of the Statement of Reasons illustrate that generosity (JA 220, 225, emphasis added):

> The investigation disclosed other locals which gave inadequate notice of election. . . . In an International as large as this there is a constant fluctuation in the number of members and this fact was taken into consideration. On the other hand, if an identifiable and defined group did not receive notice, such as members on lay-off or at a separate location, *it has been assumed that had notice been received by those members that all would have voted and all would have voted for Sadlowski.* Where there was a failure to mail notice to a substantial number of members, *those members who did not receive notice are assumed to have been for Sadlowski.* • • •
>
> For a variety of reasons some locals failed to hold elections thus depriving the members of their right to vote. The position of the Secretary with respect to

[12] JA 281-283, 286.

[13] JA 150.

this type of violation is that all eligible voters may have been affected by the violation and *to assume further that if these voters had been given an opportunity to vote that all may have voted for Sadlowski.*

Where no election was held or inadequate notice given, it is highly unrealistic to assume that, otherwise, every member would have voted *and* that every vote would have been for the Sadlowski slate. Yet even after crediting the Sadlowski slate with thousands of votes based upon such assumptions, and accounting for every violation found, each member of that slate still would have fallen well short, as plaintiffs concede, of winning his respective contest (without, of course, even adding in the Canadian margins). Plaintiffs must invent a new meaning for the phrase "arbitrary and capricious" if it is to apply to the Secretary's "failure" to go out and conduct an "additional investigation"—where there were no grounds to suspect the propriety of the election in any of the locals not investigated—or to credit additional Sadlowski slate contentions which the Secretary had already concluded were without merit, simply because the United States margin in the closest race had been reduced (but not eliminated) by his other findings.

(iii) Similar to the "example" just discussed is plaintiffs' assertion that it was arbitrary and capricious for the Secretary not to "extrapolate" the "rate of violation" found in the locals which were investigated "to the totality of United States locals." Pet. at 17. The Secretary was at pains to explain that his investigation was not of some random collection of locals; rather, the Secretary investigated every local where there was any reason to suspect a violation. His investigation was thus complete as it stood. To extrapolate from the findings in suspect locals to those where there was no indication of any impropriety, as plaintiffs suggest, would be irrational. What the Secretary did, on the other hand, was perfectly reasonable. His Statement speaks for itself (JA 154 233-231; emphasis added):

The 301 United States locals named in the protest and

the complaint to the Secretary were investigated. In addition an investigation was conducted of the 153 local unions which filed no election returns and an additional 225 local unions were selected for investigation. *The selection of local unions for investigation was primarily based on factors which indicated some reason for suspicion, e.g.,* lopsided results, or information gathered in the technical assistance process. As a result of leads received during the course of the investigation, 33 more local unions were investigated, including all of the local unions in Puerto Rico because in its early stages the investigation indicated a high incidence of violations there.

* * * *

The investigation in the United States did not disclose widespread fraud or other irregularities as alleged, *nor were the findings such as to indicate a pattern of violations which could be extrapolated beyond the area of investigation.* On the whole, the election was conducted in accordance with the law and with the Union's Constitution.

* * * *

These figures demonstrate to the satisfaction of the Department that the violations which occurred could not have affected the outcome of the election within the United States. *The investigation did not extend to every local union, but was planned so as to focus on those areas in which there was any indicated possibility of violations being disclosed.* The investigation extended to every District and Subdistrict Office, and included a thorough review of records and interviews of personnel at the national level. At the local level, the investigation began with the locals enumerated in the complaint and all locals in which the election results appeared in any way questionable. It was expanded to include all locals for which leads were developed and, when prelimiary investigation in Puerto Rico appeared to indicate a pattern of violation, every local on that island was investigated. *Accordingly, even if there were any violations in locals which were not investigated, the investigation was so thorough and was directed in such a manner that there is no reasonable cause to believe that any such violations were significant in magnitude or in effect.*

(iv) Plaintiffs' next "example" is that the Secretary was arbitrary and capricious in applying different measures of "potential effect" on outcome to two distinct categories of probable violations.

In the first category are all probable violations which may have had a direct impact on whether or how affected union members voted—*e.g.*, the failure of a local to hold an election, or to give adequate notice, or any violation that "tended to influence voters in favor of one candidate." JA 155. As to this category the maximum number of votes that theoretically could have been affected were credited to the Sadlowski slate. See, *e.g.*, *supra* at 23-24.

The second category comprised probable violations, neutral and technical in nature, as to which it was wholly speculative whether any votes were actually affected—*e.g.*, "lack of secrecy" (for example, balloting tables too close to each other) or "inadequate safeguards." Where there was no evidence that such probable violations "tended to influence the voters in favor of one candidate," all votes theoretically affected by violations in this category were considered "void" by the Secretary. For example in Local 1245, District 8, the Secretary found that "[t]he partitions were so low that voters looked over them to see how other members were voting." JA 203. The results from that local showed 301 votes for McBride and 177 for Sadlowski. The Secretary accounted for this secrecy violation by voiding all of of these votes—thus reducing the McBride margin by 124 votes—even though there was no evidence that a single vote would have been changed had the partitions been higher. Plaintiffs assert that in so doing, in this and similar instances, the Secretary was arbitrary and capricious. Apparently, in plaintiffs view the only rational approach to the problem in Local 1245, and others like it, is to treat the probable violation there the same as probable violations favoring one candidate; in Local 1245, then, plaintiffs' "rationality" would dictate counting all 301 McBride votes

as Sadlowski votes—in plaintiffs' view, evidently, had the partitions been higher all 301 McBride voters would have voted for Sadlowski—leaving the totals for that local as Sadlowski 478, McBride 0. At best plaintiffs offer a challenge to the Secretary's judgment, not his rationality; and, even as a matter of judgment, the Secretary—whose job it is to make such judgments—has far the better of it.

It is true that in *Bachowski* v. *Brennan*, 413 F.Supp. 147 (W.D. Pa.), *appeal dismissed on procedural grounds*, 545 F.2d 363 (3d Cir. 1976), a district judge appears to have adopted arguments similar to those made here by plaintiffs. We submit one commentator's description of that opinion:

> This decision, resting on narrow and questionable legal grounds is exceptional.[55]

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[55] In so [ruling], the court may have evinced some restiveness with the Supreme Court's decision by applying the "arbitrary and capricious" standard in a somewhat unorthodox manner. In calculating the effect that violations may have had on the outcome of the election, the Secretary distinguished between "cases where the number of votes affected can be ascertained with some certainty, and cases where it cannot." *Bachowski* v. *Brennan*, 413 F. Supp. 147, 149 (W.D. Pa.), *appeal dismissed*, 545 F.2d 363 (3d Cir. 1976). The Secretary explained that with violations of the latter type, "it is imposible to prove one way or the other if any voters were actually intimidated by such violations." *Id.* The Secretary reasonably concluded that it would be illogical to say that these violations may have affected the outcome of the election with the same probability as the violations "when the impact on such votes was directly affected by a violation and the number of such votes could be measured with some certainty." *Id.* Moreover, the Secretary noted that "substantive violations of a type which may *affect how a voter votes* are to be distinguished from merely technical violations of a procedural character." *Id.* at 150 ((emphasis in original). However, the court rejected the Secretary's distinction in this case and re manded to the Secretary to recalculate the effect that

the violations may have had on the outcome of the election. *Id.* at 151. Despite the Secretary's reasonable explanation of his method of computation, the court substituted its own judgment for that of the Secretary, seemingly contrary to the Supreme Court's admonition *Bachowski,* 421 U.S. at 575.

Note, *Dunlop v. Bachowski and the Limits of Judicial Review under Title IV of the LMRDA: A Proposal for Administrative Reform,* 86 Yale L.J. 885, 899-900, and note 55 (1977).

The courts below properly rejected the analysis offered by the district court in *Bachowski.* See Pet. App. 14a-15a.

(v) Plaintiffs' next "example" rests upon a mischaracterization of the Statement's findings. According to plaintiffs, the Secretary found "that USWA's willful obstruction to the recruitment of Sadlowski observers could not have affected the outcome of the election. . . ." because "the denial of observers is immaterial 'if the investigation disclosed that the election was otherwise properly conducted.' " Pet. at 18. The major defect in this assertion is that the Secretary did not find any denial of Sadlowski's right to have observers, much less a "willful obstruction to the recruitment of Sadlowski observers."

As described in the Statement, JA 185, plaintiff Sadlowski's complaint to the Secretary did not allege that his observers had been turned away from any polling place but rather that certain locals did not supply him with adequate information as to the time and place of polling. But the Secretary did not find that even the latter had occurred. "In fact," in the words of the Statement of Reasons, "complainant [Sadlowski] admits that he eventually received information from virtually all the locals." *Id.* It is true that there were a large number of locals where Sadlowski did not have observers. But the Secretary found that the reasons for that absence of Sadlowski observers were in no part the fault of the union (*id.*):

> It was learned that Sadlowski had observers at only 800 locals out of the 5,400 holding elections. In Texas the decision was made, according to the head of the Sadlowski observer team in District 37, to have observers only at locals with 1,000 or more voters. In other locals no Sadlowski observers were present although the locals returned the inquiry card sent by Sadlowski. An analysis of the election returns indicates that Sadlowski generally placed observers at those locals where he had some support. . . . Sadlowski's failure to have an observer at each local was not because the locals did not respond to his inquiry. In fact, complainant admits that he eventually received information from virtually all the locals.

The decision of a candidate not to place an observer at a local—whether because of lack of support at the local or otherwise—does not render the union conducting the election in violation of the labor election laws. Plaintiffs' notion that the Secretary was arbitrary and capricious because he did not investigate the conduct of the election in each local where Sadlowski did not place an observer is at best a non-sequitur.

(vi) Plaintiffs' sixth "example" is a complete distortion of the findings of the Secretary which are set forth in the Statement, JA 185-188, and which speak for themselves.

(vii) Plaintiffs' seventh "example" is again a complete distortion of the findings of the Secretary which are set forth in the Statement of Reasons. JA 157-160. Those pages of the Statement speak for themselves; we only note here two critical points, which plaintiffs omit to mention. First, the Statement emphasized (JA 157):

> that staff representatives are union members and have the same right as all other union members to support the candidates of their choice. This is recognized in the Department's published interpretative Regulations, ...

Second, far from "read[ing] staff violations out of LMRDA" (Pet. at 20), the Secretary found a number of

"instances of improper staff campaigning at the local level," and he made deductions from McBride's total to account for the "potential effect" of each of those instances. JA 159-160.

(viii) Plaintiffs' final attack upon the Secretary's analysis is that the Secretary did not, in assessing possible effect on outcome, proceed from the starting point that the burden was on the union to prove that the violations found did not affect the outcome. This attack is without merit for two reasons:

First, while it is true that once the Secretary sues and satisfies a court that violations occurred the union has the burden of proving that such violations did not affect the outcome, *Wirtz* v. *Hotel Employees,* 391 U.S. 492, 506 (1968), it does not follow that the Secretary, in determining *whether* to sue, must assess the impact of violations in terms of the union's burden of proof. On the contrary, this Court has declared that:

> The Secretary *may not initiate an action* until his own investigation confirms that a violation of § 401 *probably infected* the challenged election.

Wirtz v. *Bottle Blowers Assn.,* 389 U.S. 463, 472 (1968) (emphasis added). This approach was reaffirmed in *Bachowski, supra,* 421 U.S. at 570. As the Court recognized in *Bachowski,* the Secretary retains a "degree of discretion to select cases" for litigation, *id.* at 572 (quoting *DeVito* v. *Shultz,* 72 LRRM 2682, 2683 (D. D.C. 1969) (Gesell, J.)), and it is surely within his discretion to abstain from suit when *he* does not believe that the violations may have affected the outcome.

Second, plaintiffs' argument that the Secretary's analysis must take into account that the union will have the burden of proof in court would not in any event avail them in this case, for that is effectively what the Secretary did here. The violations found here were isolated, and confined in their impact. Wherever the Secretary found such an isolated violation, he assumed that it had impacted upon the entire area of its potential effect. Thus, where a violation was found in a single local (as most were), the Secretary invariably treated all the votes in that local as in jeopardy, proceeding *sub silentio* on the assumption that the union would be unable to prove that the impact was more limited (or non-existent). See, e.g. *supra,* at 22-23, 26. In this respect, the Secretary proceeded exactly as the Court did in *Hotel Employees,* where the election was within a single local union. Similarly, in those rare instances where a violation involved more than one local, the Secretary treated all the votes of all affected locals as in jeopardy (see, *e.g.* JA 179-180). Surely the Secretary was not irrational in failing to project the impact of isolated violations within certain locals over those portions of the electorate outside those locals that could not conceivably have been affected by them.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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